

H. C. OF A.

1929.

CLARK

TAIT

& Co.

v.

FEDERAL
COMMISSIONER OF
LAND TAX.

For these reasons I agree with the answers proposed by the Chief Justice and my brothers *Gavan Duffy* and *Rich* to the questions propounded in the case.

Questions answered as follows:—(1) No. (3)

No. It is unnecessary to answer (2), (4) and (5).

Solicitors for the appellants, *Whiting & Byrne*, Melbourne, by *McLachlan, Westgarth & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF
TAXATION }

APPELLANT;

AND

THE WEST AUSTRALIAN TRUSTEE
EXECUTOR AND AGENCY COMPANY
LIMITED }

RESPONDENT.

H. C. OF A.

1929.

PERTH,

Sept 13, 17.

KNOX C.J.,
Rich and
Dixon JJ.

Income Tax—Appeal from Board of Review—Incompetence—Alteration of assessment after Board's decision—Income Tax Assessment Act 1922-1928 (No. 37 of 1922—No. 46 of 1928), secs. 44 (1), 51 (4)—Income Tax Regulations (Statutory Rules 1927, No. 159), reg. 45.

The Board of Review, by a decision in writing dated 30th May 1928 and communicated to the taxpayer on 6th June 1928, determined in the taxpayer's favour a reference upon objection to an assessment. On 12th November 1928 the Deputy Commissioner issued a notice of amended assessment notifying an alteration of the assessment objected to. By the alteration the tax was assessed at the same amount as the Board had determined. On 29th November 1928 the Commissioner gave notice of appeal to the High Court against the Board's decision.

Held, that the appeal was incompetent.

APPEAL from a decision of a Board of Review.

The Deputy Commissioner of Taxation issued a notice of assessment dated 18th October 1926 for the financial year 1925-1926 of the income derived during the year ended 30th June 1925 by the West Australian Trustee Executor and Agency Co. Ltd. as trustee of a settlement made by Ernest Augustus Lee Steere in favour of his daughters. The Company lodged notice of objection with the Commissioner on 26th November 1926 on the ground that the provisions of sec. 13 (9) of the *Income Tax Assessment Act* 1922-1925 should be applied, in order to ascertain the rate of tax to be imposed on the taxable income. By a notification dated 16th March 1927 the Deputy Commissioner informed the Company that the objection had been disallowed. By a letter dated 28th March 1927 the Company requested the Deputy Commissioner to refer the decision to the Board of Review.

The Board of Review expressed its decision in a written and signed statement of its reasons dated 30th May 1928, which concluded :—" After full consideration of the evidence submitted and the arguments advanced both by the appellant and the respondent, the Board, by a majority, is of opinion that the appeal should be sustained. Appeal allowed—the assessment to be amended by assessing the trustee in respect of income derived during the year ended 30th June 1925 as if he had never been a taxpayer in a previous year. Deposit to be refunded." Counsel stated that this was communicated to the taxpayer and received by it on 6th June 1928. It was communicated also to the Commissioner of Taxation, but the precise date of its receipt by him was not known. However, communications by him in August 1928 with the Deputy Commissioner in Perth upon the subject were referred to. By a letter dated 11th October 1928 in answer to a communication from the taxpayer dated 15th September 1928, the Commissioner informed it that he was awaiting further advice from the Crown Law Department, which was being reminded of the matter. A notice of amended assessment, dated 12th November 1928, was issued by the Deputy Commissioner notifying the taxpayer that the assessment had been altered as thereunder appeared. The alteration showed a difference between the amount of tax and that paid, and on

H. C. OF A.

1929.

FEDERAL
COMMIS-
SIONER OF
TAXATION

v.

WEST
AUSTRALIAN
TRUSTEE
EXECUTOR
AND
AGENCY
CO. LTD.

H. C. OF A.
1929.

FEDERAL
COMMISSIONER OF
TAXATION
v.
WEST
AUSTRALIAN
TRUSTEE
EXECUTOR
AND
AGENCY
CO. LTD.

comparison with the former assessment and the Board's decision it would be seen that the rate of tax had been reduced and conformed with the Board's decision. The notice of amended assessment concluded with the usual statement that objections might be lodged within forty-two days. By notice of appeal dated 29th November 1929 the Commissioner appealed to the High Court against the Board's decision. Shortly afterwards he refunded the difference between the tax paid on the former assessment and that appearing to be due by the Board's decision and notice of amended assessment.

J. L. Walker, for the appellant.

Stawell K.C. (with him *Forman*), for the respondent, took a preliminary objection that the appeal was incompetent. Reg. 45 of the Statutory Rules 1927, No. 159, gives the Commissioner thirty days to elect to appeal or carry the Board's decision into effect. He did not appeal within thirty days; on the contrary he elected to issue an amended assessment adopting the Board's decision. He also repaid the money voluntarily. Having acted under the decision, he cannot now appeal and attack it. The original assessment has gone. The appeal was out of time in any case. [Counsel referred to *M'Hugh v. M'Goldrick* (1) and *Liverpool and London and Globe Insurance Co. v. Federal Commissioner of Taxation* (2).]

J. L. Walker. Reg. 45 does not limit the time for appeal. Sec. 53, under which rules have now been made by the Justices of the High Court as to appeals from the Board, gives the only power to regulate time for appealing. Sec. 100 does not enable the Governor-General in Council to do so.

[DIXON J. It has been suggested that the calculation of the amount of tax as distinguished from the ascertainment of the income is not concluded by the assessment and is not the subject of assessment objection and appeal. See secs. 35, 39 and 50 (1), and compare sec. 67 as to penal tax, which perhaps is not the subject of assessment.]

(1) (1921) 2 I.R. 163.

(2) (1927) 40 C.L.R. 108.

The Commissioner merely obeyed reg. 45 in altering the assessment and made no election. He was bound to repay the money.

H. C. OF A.
1929.

FEDERAL
COMMISSIONER OF
TAXATION

v.

WEST
AUSTRALIAN
TRUSTEE
EXECUTOR
AND
AGENCY
CO. LTD.

KNOX C.J.

Counsel for the respondent were not called on in reply.

The following judgments were delivered :—

KNOX C.J. I think that this point is a good one and that the appeal is incompetent.

The meaning of reg. 45 seems to me to be that the Commissioner is put on his election to take one course or the other within thirty days after receiving notice of the decision of the Board of Review : he has either to appeal or give effect to its decision. If the decision of the Board is expressed in the form of an amendment of the Commissioner's assessment, there is nothing for the Commissioner to do, in order to give effect to it, but repay the amount overpaid by the taxpayer. If, on the other hand, the decision of the Board does not amount to an assessment, it is simply a decision to which the Commissioner if he does not appeal is bound to give effect, as he has done in this case, by issuing an amended assessment based on the decision. Having done that, he cannot turn round and adopt the other course of appealing. The only assessment now in existence is the amended assessment, and, that having been issued by the Commissioner, he has no right of appeal against it. The appeal is, therefore, incompetent.

RICH J. I agree that on any view of the matter the appeal is incompetent.

DIXON J. I agree. I should like to add that I do not think the Board of Review has sufficiently appreciated the effect of sec. 44 (1) and sec. 51 (4), which appear to cast upon the Board the duty or function of making assessments, determinations and decisions in lieu of the assessments, the determinations and the decisions of the Commissioner which it reviews. If the Act means, as at present I am disposed to think it does, that the functions of the Commissioner are again to be performed by the Board when a taxpayer has requested the Commissioner to refer his decision upon the taxpayer's objections

H. C. OF A.
1929.

FEDERAL
COMMISSIONER OF
TAXATION
v.
WEST
AUSTRALIAN
TRUSTEE
EXECUTOR
AND
AGENCY
CO. LTD.

Dixon J.

to the Board, then reg. 45 ought not to be construed as requiring the Commissioner to make a reassessment or an alteration in order to record and give formal efficacy to the Board's pronouncement. The Board is authorized by the Act to give formal shape and validity to its own decisions. Upon this view reg. 45 should be considered as requiring that practical effect should be given to the Board's decisions. Its operation would resemble that of sec. 52 (2). If this be the correct view of the regulation, the Commissioner has gratuitously altered the assessment, or gratuitously made an amended assessment and has thus superseded the act of the Board from which he desires to appeal. He cannot appeal from his own act, and we could not set aside or vary his amended assessment even if this appeal were permitted. It is superimposed upon the decision of the Board, and it is only with that we could deal on this appeal. It is not necessary, however, to decide whether this is the correct construction of the Act and regulation, because upon the alternative constructions the appeal is incompetent. If sec. 51 (6) and sec. 53 enable an appeal to be made within the time limited by Rules of Court, and there is no power to impose a limitation by regulation, then, unless and until Rules of Court were made the appeal might be brought within a reasonable time. But, having regard to the dates given to us just now by Mr. *Stawell* and Mr. *Walker*, I think a reasonable time elapsed before notice of appeal was given. If reg. 45 means to give an election either to appeal within thirty days or to give effect to the Board's decision, then the Commissioner elected not to appeal. These appear to me to be the interpretation of the statutory provisions and the regulation which are reasonably open, and upon each of them the Commissioner lost his appeal from the Board's decision, if a completed decision it be. I therefore think the appeal is incompetent and should be struck out or dismissed.

Appeal struck out.

Solicitor for the appellant, *J. L. Walker*, Crown Solicitor for Western Australia.

Solicitors for the respondent, *Stawell, Hardwick & Forman*.